Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1894

PETER REID WATSON,)

Petitioner,)

vs.)

UNITED STATES OF AMERICA,)

Respondent.)

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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TOPICAL INDEX

Page

Citation of Authorities: ii

Opinion Below 1, 2

Jurisdiction 2,

Questions Presented. 3

Federal Statutes Involved. 3, 4

Statement of the Case & Facts. . . 5 -8

Question I 9

Argument 9-22

Certificate of Service 23, 24

CITATION OF AUTHORITIES

Cases Cited:	Page
United States v. Constant, 501 F 2d 1284 (5th Cir. 1974) cert. den. 420 U.S. 910 (1975)	18,
United States v. Johnston, 547 F 2d 282 (5th Cir. 1977)	2, 10, 18,
Kann v. United States, 323 U.S. 88 (1944)	13, 14, 21,
United States v. Maze, 414 U.S. 395 (1974)	13, 15,
Parr v. United States, 363 U.S. 370 (1960)	16,
United States v. Staszuk, 502 F 2d 875 (7th Cir. 1974) 517 F 2d 53 (7th Cir. 1974)	12,
United States v. Shepherd, 511 F 2d 119 (5th Cir. 1975)	18, 19, 20
Statutes:	
28 U.S.C.A. Sup. Ct. Rule 19	9, 10
Title 18 U.S.C. §1341	3, 4
Title 28 U.S.C. §1254	2

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PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Peter Reid Watson, by and through his undersigned counsel, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this criminal case on May 25, 1977.

OPINION BELOW

The judgment sought to be

reviewed is not reported in the official reporter. A copy of the per curiam affirmed decision in slip form is appended hereto (E-1)*. No opinion was rendered in this cause presumably because of a previous opinion rendered in a companion case on February 18, 1977. The companion's opinion is styled UNITED STATES v. JOHNSTON and may be found at 547 F. 2d 282 (5th Cir. 1977).

JURISDICTION

The judgment sought to be reviewed is final and was dated and entered May 25, 1977. Jurisdiction to review this decision by certiorari is conferred by Title 28 U.S.C. §1254.

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*References to the exhibits are designated by the abbreviation "E" followed by the page number.

QUESTIONS PRESENTED

I.

WHETHER A MAILING IN THE COLLECTION PROCESS IS SUFFICIENT USE OF THE MAILS TO FIND MAIL FRAUD, WHERE MONIES WERE SECURED BECAUSE OF BANK ERROR IN ALLOWING WITHDRAWALS THE SAME DAY AS DEPOSIT AND THERE WAS NO NEED, DESIGN OR PLAN TO BEAT THE MAIL IN THE COLLECTION PROCESS TO SECURE THE FUNDS AND NO SUCH PLAN OR DESIGN WAS USED IN SECURING SUCH FUNDS?

FEDERAL STATUTES INVOLVED

Title 18 U.S.C. §1341 reads:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated, or held out to be such counterfeit or spurious article, for the purpose of

executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE AND FACTS

Petitioner Peter Reid Watson and several others were indicted on one count of conspiracy to commit mail fraud and multiple counts of mail fraud (R-1)* Mr. Watson pled guilty to Count 22 of the Indictment, reserving his right to appeal the issue of jurisdiction. Other co-defendants went to trial before a jury in the United States District Court for the Middle District of Florida.

The evidence established that the petitioner was involved in a scheme to

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*References to portions of the record-on-appeal other than transcripts are designated by the abbreviation "R" placed in parenthesis, followed by the appropriate page number.

defraud funds from various banking institutions. A check drawn on an account in one back would be deposited in another bank. The deposit was indicated as being a cash deposit in each instance. Subsequent to the deposit, the petitioners would withdraw cash from the account. The banks allowed these withdrawals to be made long before the checks on the drawee bank were returned. In each instance there were insufficient funds to cover the deposited checks. (Tr. I, 86, 94, 100-102, 194)*. There was no effort whatsoever to beat the mails to the drawee bank to reflect a false credit on that

*References to transcripts contained in the record are indicated by the abbreviation "Tr", followed by the volume and page numbers.

account so that issued checks would clear. In each case the lack of sufficient funds and consequent "bad" checks were detected as a result of the use of mails. The checks were credited to the account and funds were available immediately. A number of bank officials made it clear that withdrawal of the funds was in no way dependent upon the time lag in the collection process. There normally was a holding period before withdrawals, however, due to bank error that procedure was not followed in this case. (Tr. I, 136-138, 143, 195, Tr. II, 247, Tr. III, 328, 331). It was solely as a result of these gross mistakes that funds were secured. Based on this evidence the court found the petitioner guilty of mail fraud, likewise the co-

defendants who went to trial were found guilty by jury.

I.

A MAILING IN THE COLLECTION PROCESS IS NOT FOR THE PURPOSE OF EXECUTING A FRAUDULENT SCHEME WHERE FUNDS WERE SECURED THROUGH BANK ERROR IN ALLOWING WITHDRAWAL OF MONIES FROM AN ACCOUNT IN WHICH A CHECK HAS BEEN DEPOSITED THE SAME DAY OF DEPOSIT AND THERE IS NO PLAN OR DESIGN TO BEAT THE MAILS TO THE DRAWEE BANK TO SECURE THE FUNDS BY REFLECTING A FALSE BALANCE IN THE DRAWEE BANK UPON WHOM THE DEPOSITED CHECK IS DRAWN.

This case is presented to this court for review under the provision of United States Supreme Court Rule 19, 28 U.S.C.A., which provides that a case is appropriate for review by certiorari in the following cases:

> "(6) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter...or has decided a federal question in a way in conflict with applicable decisions of this

> court; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

Under these guidelines, it is clear this case is appropriate for the exercise of this court's power of supervision.

Under the first guideline set out above, review is appropriate where a decision of the court of appeals conflicts with those of other courts of appeal. The second guideline, related to the first, is where a decision of a court of appeals conflicts with decisions of this Court.

The decision in the instant case, as evinced by the opinion in the case of UNITED STATES v. JOHNSTON and

supported by the affirmance in this case, is in direct conflict with those of another court of appeal. The decision in the instant case is also in direct conflict with the decisions of this Court.

In the case sub judice, the court found that use of the mails was for the purpose of executing the scheme because the success of fraud depended on the delay of the check clearing process. It was the court's position that because funds were not withdrawn until the account was credited and the funds were withdrawn before the checks were returned, that the delay caused by the mails was for the purpose of executing the plan. This conclusion is in conflict with the uncontroverted evidence that the funds were received because of

bank error and not because of the delay of the mails.

In the UNITED STATES v. STASZUK, 502 F. 2d 875 (7th Cir. 1974), modified on other grounds at 517 F. 2d 53 (7th Cir. 1974), the court specifically held that the delay in the mail must contribute to the furtherance of the scheme to be violation of the Federal provision. In the instant case, the mailings resulted in the discovery of the scheme after the money had been received, but not to the furtherance of the scheme. The money received was the result of bank error in allowing withdrawals the same day of deposit and not because of any activities regarding the mails.

The facts of this case are even less reconcilable with the decisions

of this Court in KANN v. UNITED STATES, 323 U.S. 88 (1944) and UNITED STATES v. MAZE, 414 U.S. 395 (1974). The decisions in both of these cases have clearly been traversed by the Fifth Circuit Court of Appeals in rendering its decision in the instant case.

In KANN, supra, defendants secured funds and property through fraud and misrepresentation. In the course of the scheme, they secured checks payable to them, cashed them and the checks were mailed from one bank to another in the clearing process. This Court said of these circumstances that the scheme had reached fruition as to each transaction and the fact that there might be future transactions was of no importance. The mailings in the collection process were found to be

collateral and incidental to the scheme.

In KANN, supra, this Court clearly described the nature of the conduct proscribed by the federal mail fraud statute. This Court stated:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud...Also to be distinguished are cases where the use of mails is a means of concealment so that further frauds which are a part of the scheme may be perpetrated. In these cases mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check although it is conceivable that this alone, in some settlings, would be enough. 323 U.S. 94"

The instant case is one in which the mailings in the clearing process were collateral to the scheme conducted by the defendants. The clearing process in no way aided in the furtherance

of the receipt of monies. In spite of these facts, and in direct conflict with the KANN decision, the circuit court held that delay in the collection process was sufficient in itself to bring the case within the mail fraud statute, regardless of how remote that was from the perpetration of any offense.

The decision by the circuit court also conflicts with the case of UNITED STATES v. MAZE, 414 U.S. 395 (1974). In that case, defendant used someone else's credit card to secure goods and services. The invoices were sent by mail to the responsible bank for collection and it was this mailing the government claimed supported its position that the mail fraud statute had been violated. This Court rejected

that contention because (1) the plan reached fruition as a result of something other than the mailings; (2) the successful completion of the mails increased the probability that the scheme would be detected; (3) there was no "lulling" of the victims. The Court stressed the fact:

> "There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances, mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance and not the mail service which causes the time lag in the physical transmission of such correspondence. 414 U.S. 403."

See also, PARR v. UNITED STATES, 363 U.S. 370 (1960).

In the instant case, petitioner secured funds for reasons wholly unrelated to the mails. That is, the money was secured due to bank error in allowing withdrawals the same day of deposit. The delay in each transaction was caused by the distance, and not by virtue of the mails. The distance involved consisted of the distance between Federal Reserve Banks and drawer banks. The mailings would have caused the detection of the plan, if anyone had bothered to report it. No one did in this case and thus the bank error and not the mails aided in the perpetration and execution of the securing of the money.

These conflicts provide a firm foundation upon which this Court should

accept jurisdiction over this case. This foundation is strengthened by the fact that the instant case is in conflict with decisions of the Fifth Circuit Court of Appeals as well. This case is exemplary of a departure from accepted and usual course of proceedings.

In the companion case of UNITED STATES v. JOHNSTON, the court relied upon its own decisions in UNITED STATES v. SHEPHERD, 511 F. 2d 119 (5th Cir. 1975); and UNITED STATES v. CONSTANT, 501 F. 2d 1284 (5th Cir. 1974), cert. den. 420 U.S. 910 (1975). These cases are obstensibly the same foundation upon which the circuit court affirmed in the instant case without rendering an opinion. A close look at these cases shows they fail to support the

circuit court's judgment herein.

In SHEPHERD, supra, the court held that a check kiting scheme constituted mail fraud for the reasons that (1) the defendant did not intend to irrevocably receive the proceeds of the scheme, but only to obtain a period of "forced credit"; (2) the scheme was ongoing; and (3) the mails caused a delay which permitted the "forced credit" and the continuation of the plan. In SHEPHERD, the court held:

> "As in CONSTANT the use of the mails by Shepherd was a central element of the scheme. Shepherd's receipt of forced credit involved a series of deposits of worthless checks to cover the dishonor of prior worthless checks. Consequently, not only did he obtain forced credit during the collection process of the initial checks deposited, but he was able to extend this credit by subsequent deposits of worthless checks. The delay caused by the mails was therefore doubly

crucial." 511 F. 2d 122.

The Fifth Circuit has held under its decision that the mailing must be a central element in the scheme and intended for the purpose of concealment. It must permit continuation of the scheme and must serve to assist the plan.

In our case, this is not the circumstance. There was no effort to take advantage of the mail-caused delay to rush between banks to obtain forced credit. The funds were irrevocably obtained. Under these facts, the Fifth Circuit has incorrectly applied its previous decision in SHEPHERD.

Petitioner is well aware of the Court's overwhelming case load and recognized the need to present a strong case to compel this Court to expend

precious minutes in deciding still another case. This case we feel presents such facts as should be reviewed and decided upon by this Court.

Failure to hear this case may result in an unintended expansion of the mail fraud statute. If the Fifth Circuit's decision stands, the mail fraud statute will be expanded beyond the Congressional intent and indeed beyond Constitutional authority. The Fifth Circuit has forgotten and has traversed this Court's admonition in KANN v. UNITED STATES, supra, at 95, that:

> "The mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

This case is not one of the limited instances to which the mail fraud statute is meant to apply. Failure to rule on this case will lead to confusion and misunderstanding in future applications of the mail fraud statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the United States Attorney, United States Post Office and Courthouse, Tampa, Florida, and to the Solicitor General, Department of Justice, Washington, D.C., 20530, by United

States Mail, this 22nd day of July,

1977.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-1721, 76-2013
76-2014, 76-2015
and 76-2158
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOWARD SYLVESTER LAWSON,
also known as "Joe,"

Defendant-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER REID WATSON,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH WALDO FLANDERS,

Defendant-Appellant,

EXHIBIT 1
(page 1 of 2 pages)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE R. TINDALL,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLD DEE PLUMLEE, SR.,

Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

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(May 25, 1977)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of

New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.